

**IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI**

STRACK EXCAVATING, L.L.C.)	
)	
)	
Petitioner,)	
)	
Vs.)	Case No. 14AC-CC00118
)	
MISSOURI DEPARTMENT OF)	
NATURAL RESOURCES,)	
LAND RECLAMATION)	
COMMISSION,)	
)	
Respondents.)	

ANSWER OF RESPONDENTS

Respondents Department of Natural Resources and the Missouri Land Reclamation Commission jointly answer the individual paragraphs of the petition as follows:

1. Admit ¶ 1.
2. Admit ¶ 2.
3. As to ¶ 3, deny that the Court has subject matter jurisdiction for the reasons set forth in the affirmative defenses and the motion to dismiss that are included with this answer. Admit that the Defendants are domiciled in Cole County, for purposes of venue.

COUNT I – Construction of § 444.771 RSMo

4. As to 4, restate their answers to ¶¶ 1-3.

5. Admit ¶ 5.

6. Admit ¶ 6, with clarification. Admit that Strack's permit application was deemed complete after found in compliance with regulatory requirements for such application and public notification requirements.

Clarify that the Staff Director's recommended approval was based on permit application completeness only.

7. Admit ¶ 7 in part and deny in part. Deny that the commission meeting on January 27, 2011 was a public hearing. The January 27, 2011 commission meeting was an open public meeting. Admit that the January 27, 2011 commission meeting allowed persons opposed to the permit to request a formal hearing.

8. Admit ¶ 8.

9. Admit ¶ 9.

10. Admit ¶ 10.

11. Admit ¶ 11.

12. Admit ¶ 12.

13. Admit ¶ 13.

14. Admit ¶ 14.

15. Admit ¶ 15 in part. Admit that Hearing Officer Tichenor intended his recommended order to comply with § 444.771 RSMo Supp. 2013;

but aver that his order incorrectly cited this provision as § 444.731 RSMo, which does not exist.

16. Admit ¶ 16.

17. Admit ¶ 17.

18. Admit ¶ 18.

19. Admit ¶ 19.

20. As to ¶ 20, admit that the statute speaks for itself, and point out that Petitioner has quoted a portion of it, not necessarily within context.

21. Aver that ¶ 21 requires no answer, in that it is Petitioner's interpretation of the statute.

22. Admit for purposes of ¶ 22 that counsel for Petitioner has discussed Petitioner's interpretation of § 444.771 RSMo with the undersigned Assistant Attorney General, and that they disagree.

23. Admit ¶ 23 in part and deny in part. Admit that there is a disagreement between Petitioner and Respondent regarding the construction and interpretation of § 444.771 as to whether the provision does or does not allow Petitioner to expand its mine, but deny that the disagreement is a "justiciable controversy." Petitioner has not filed an application for a permit to expand a mine plan to within 1,000 feet of an accredited school that has existed on the same property for five years; therefore, Respondents have not responded to any such application. In the absence of an actual application

and an adverse decision regarding it by Respondents, Petitioner is improperly seeking an advisory opinion from the Court.

24. As to ¶ 24, aver that because Petitioner has not filed an application to expand an existing mine to encroach the 1,000-foot setback required by § 444.771 RSMo and Petitioner's permit, Petitioner is improperly seeking an advisory opinion from this Court.

25. Deny ¶ 25, in that Chapter 527 RSMo does not authorize the Court to render an advisory opinion.

26. Deny ¶ 26.

COUNT II - Constitutional Challenges

27. As to ¶ 27, restate their answers to ¶¶1-26.

28. As to ¶ 28, aver that the provision speaks for itself.

29. As to ¶ 29, aver that the provision speaks for itself.

30. Aver that ¶ 30 requires no answer because it states Petitioner's legal argument.

31. Aver that ¶ 31 requires no answer because it states Petitioner's legal argument. Further answering, Petitioner lacks standing to represent accredited schools that have been in existence fewer than five years.

32. Aver that ¶ 32 requires no answer because it states Petitioner's legal argument.

33. Aver that ¶ 33 requires no answer because it states Petitioner's legal argument.

34. As to ¶ 34, aver that the provision speaks for itself.

35. Aver that ¶ 35 requires no answer because it states Petitioner's legal argument.

36. Aver that ¶ 36 requires no answer because it states Petitioner's legal argument.

37. Aver that ¶ 37 requires no answer because it states Petitioner's legal argument.

38. Deny ¶ 38.

Count III – Alleged Retrospective Impairment of Rights

39. As to ¶ 39, restate their answers to ¶¶ 1-38.

40. As to ¶ 40, aver a lack of information to either admit or deny that Petitioner expended time and money in obtaining a “water permit” as alleged. Further answering, ¶ 40 is vague as to the meaning of “the proposed mine plan” because Petitioner voluntarily reduced the number of acres to be included in the plan in order to obtain a land reclamation permit that provided the 1,000-foot buffer between Petitioner's mine plan and Saxony Lutheran High School as required by § 444.771 RSMo. Further answering, aver that a permit issued under Chapter 644 RSMo, the Missouri Clean

Water Law, was required for the mine plan Petitioner accepted in order to obtain the permit.

41. Admit ¶ 41, but aver that the outfalls established by the “water permit” are not within the 1,000-foot buffer between Petitioner’s permitted mine plan area and Saxony Lutheran High School.

42. As to ¶ 42, aver a lack of information to either admit or deny that Petitioner expended time and money in obtaining an “air permit” as alleged. Further answering, ¶ 42 is vague as to the meaning of “the proposed mine plan” because Petitioner voluntarily reduced the number of acres to be included in the plan in order to obtain a land reclamation permit that complied with the 1,000-foot buffer between Petitioner’s mine plan and Saxony Lutheran High School as required by § 444.771 RSMo. Further answering, aver that a permit issued under Chapter 643 RSMo, the Missouri Air Conservation Law, was required for the mine plan Petitioner accepted in order to obtain the permit.

43. Admit ¶ 43. Further answering, the air permit is for the crusher that is located more than 1,000 feet from the property line shared by Petitioner and Saxony Lutheran High School. In fact, the modeling of ambient air quality for the crusher was calculated at a distance of greater than 2,000 feet from the property line.

44. Admit ¶ 44, with clarification. Admit that Strack's permit application was deemed complete after found in compliance with regulatory requirements for such application and public notification requirements. Clarify that the Staff Director's recommended approval was based on permit application completeness only.

45. Admit ¶ 45, but aver that it is irrelevant, in that, to the best of knowledge and belief, none of the site work was within the 1,000-foot buffer between permitted mine plan and Saxony Lutheran High School's property.

46. Aver that ¶ 46 requires no answer because it states Petitioner's legal argument.

47. Aver that ¶ 47 requires no answer because it states Petitioner's legal argument.

Affirmative Defenses and Motion to Dismiss

48. Because Petitioner has not filed, and Respondent has therefore not denied, an application for a permit to expand a mine plan to be closer than 1,000 feet of any real property where an accredited school has been located for at least five years prior to such application, this case does not present a case or controversy for the Court to decide.

49. Because Petitioner has not filed, and Respondent has therefore not denied, an application for a permit to expand a mine plan to be closer than 1,000 feet of any real property where an accredited school has been

located for at least five years prior to such application, this civil action is not ripe.

50. Because Petitioner has not filed, and Respondent has therefore not denied, an application for a permit to expand a mine plan to be closer than 1,000 feet of any real property where an accredited school has been located for at least five years prior to such application, Petitioner has failed to exhaust available administrative remedies.

51. For the reasons set forth in ¶¶ 48 – 50, Petitioner is improperly asking this Court to issue an advisory opinion.

52. For the reasons set forth in ¶¶ 48 – 51, this Court must dismiss the petition for lack of subject matter jurisdiction.

53. For the reasons set forth in ¶¶ 48 – 51, this Court must dismiss the petition because Petitioner has failed to state a claim upon which relief can be granted.

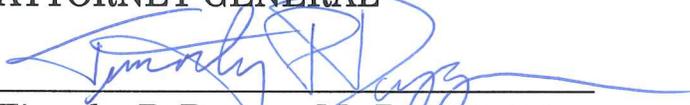
54. During the contested case hearing regarding whether the Land Reclamation Commission should issue the permit to which Petitioner refers in ¶¶ 15 and 16 of the petition, Petitioner agreed to reduce the area of the mine plan in order to accept as a permit condition the requirement of a 1,000-foot buffer between Petitioner's mine plan boundary and the property of Saxony Lutheran High School. Petitioner did not timely seek judicial review of the permit to challenge that condition or the validity of § 444.771 RSMo.

Therefore, the permit condition is final and Petitioner is barred by the doctrines of issue waiver, or collateral estoppel, or res judicata from bringing this action as a collateral attack upon the 1,000-foot buffer required by the permit.

WHEREFORE, Respondent prays for a judgment dismissing the petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of April, 2014, the foregoing was electronically mailed to all counsel of record.

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